

Thomas Jefferson to Robert R. Livingston, September 9, 1801, The Works of Thomas Jefferson in Twelve Volumes. Federal Edition. Collected and Edited by Paul Leicester Ford.

TO THE U. S. MINISTER TO FRANCE J. MSS. (ROBERT R. LIVINGSTON.)

Monticello, Sep. 9, 1801.

Dear Sir, —You will receive, probably by this post, from the Secretary of State, his final instructions for your mission to France. We have not thought it necessary to say anything in them on the great question of the maritime law of nations, which at present agitates Europe; that is to say, whether free ships shall make free goods; because we do not mean to take any side in it during the war. But, as I had before communicated to you some loose thoughts on that subject, and have since considered it with somewhat more attention, I have thought it might not be unuseful that you should possess my ideas in a more matured form than that in which they were before given. Unforeseen circumstances may perhaps oblige you to hazard an opinion, on some occasion or other, on this subject, and it is better that it should not be at variance with ours. I write this, too, myself, that it may not be considered as official, but merely my individual opinion, unadvised by those official counsellors whose opinions I deem my safest guide, & should unquestionably take in form, were circumstances to call for a solemn decision of the question.

When Europe assumed the general form in which it is occupied by the nations now composing it, and turned its attention to maritime commerce, we found among its earliest practices, that of taking the goods of an enemy from the ship of a friend; and that into this practice every maritime State went sooner or later, as it appeared on the theatre of the ocean. If, therefore, we are to consider the practice of nations as the sole & sufficient

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evidence of the law of nature among nations, we should unquestionably place this principle among those of natural laws. But it's inconveniences, as they affected neutral nations peaceably pursuing their commerce, and it's tendency to embroil them with the powers happening to be at war, and thus to extend the flames of war, induced nations to introduce by special compacts, from time to time, a more convenient rule; that "free ships should make free goods"; and this latter principle

has by every maritime nation of Europe been established, to a greater or less degree, in it's treaties with other nations; insomuch, that all of them have, more or less frequently, assented to it, as a rule of action in particular cases. Indeed, it is now urged, and I think with great appearance of reason, that this is genuine principle dictated by national morality; & that the first practice arose from accident, and the particular convenience of the States¹ which first figured on the water, rather than from well-digested reflections on the relations of friend and enemy, on the rights of territorial jurisdiction, & on the dictates of moral law applied to these. Thus it had never been supposed lawful, in the territory of a friend to seize the goods of an enemy. On an element which nature has not subjected to the jurisdiction of any particular nation, but has made common to all for the purposes to which it is fitted, it would seem that the particular portion of it which happens to be occupied by the vessel of any nation, in the course of it's voyage, is for the moment, the exclusive property of that nation, and, with the vessel, is exempt from intrusion by any other, & from it's jurisdiction, as much as if it were lying in the harbor of it's sovereign. In no country, we believe, is the rule otherwise, as to the subjects of property common to all. Thus the place

1 Venice and Genoa (*in margin*).

occupied by an individual in a highway, a church, a theatre, or other public assembly, cannot be intruded on, while it's occupant holds it for the purposes of it's institution. The persons on board a vessel traversing the ocean, carry with them the laws of their nation, have among themselves a jurisdiction, a police, not established by their individual will, but by the authority of their nation, of whose territory their vessel still seems to compose

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a part, so long as it does not enter the exclusive territory of another. No nation ever pretended a right to govern by their laws the ship of another nation navigating the ocean. By what law then can it enter that ship while in peaceable & orderly use of the common element? We recognize no natural precept for submission to such a right; & perceive no distinction between the movable & immovable jurisdiction of a friend, which would authorize the entering the one & not the other, to seize the property of an enemy.

It may be objected that this proves too much, as it proves you cannot enter the ship of a friend to search for contraband of war. But this is not proving too much. We believe the practice of seizing what is called contraband of war, is an abusive practice, not founded in natural right. War between two nations cannot diminish the rights of the rest of the world remaining at peace. The doctrine that the rights of nations remaining quietly under the exercise of moral & social duties, are to give way to the convenience of those who prefer plundering & murdering one another, is a monstrous doctrine; and ought to yield to the more rational law, that "the wrongs which two nations endeavor to inflict on each other, must not infringe on the rights or conveniences of those remaining at peace." And what is *contraband*, by the law of nature? Either everything which may aid or comfort an enemy, or nothing. Either all commerce which would accommodate him is unlawful, or none is. The difference between articles of one or another description, is a difference in degree only. No line between them can be drawn. Either all intercourse must cease between neutrals & belligerents, or all be permitted. Can the world hesitate to say which shall be the rule? Shall two nations turning tigers, break up in one instant the peaceable relations of the whole world? Reason & nature clearly pronounce that the neutral is to go on in the enjoyment of all it's rights, that it's commerce remains free, not subject to the jurisdiction of another, nor consequently it's vessels to search, or to enquiries whether their contents are the property of an enemy, or are of those which have been called contraband of war.

Nor does this doctrine contravene the right of preventing vessels from entering a blockaded port. This right stands on other ground. When the fleet of any nation actually beleaguers the port of its enemy, no other has a right to enter their line, any more than

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their line of battle in the open sea, or their lines of circumvallation, or of encampment, or of battle array on land. The space included within their lines in any of those cases, is either the property of their enemy, or it is common

property assumed and possessed for the moment, which cannot be intruded on, even by a neutral, without committing the very trespass we are now considering, that of intruding into the lawful possession of a friend.

Although I consider the observance of these principles as of great importance to the interests of peaceable nations, among whom I hope the U S will ever place themselves, yet in the present state of things they are not worth a war. Nor do I believe war the most certain means of enforcing them: Those peaceable coercions which are in the power of every nation, if undertaken in concert & in time of peace, are more likely to produce the desired effect.

The opinions I have here given are those which have generally been sanctioned by our government. In our treaties with France, the United Netherlands, Sweden & Prussia, the principles of free bottom, free goods, was uniformly maintained. In the instructions of 1784, given by Congress to their ministers appointed to treat with the nations of Europe generally, the same principle, and the doing away contraband of war, were enjoined, and were acceded to in the treaty signed with Portugal. In the late treaty with England, indeed, that power perseveringly refused the principle of free bottoms, free goods; and it was avoided in the late treaty with Prussia, at the instance of our then administration, lest it should seem to take side in a question then threatening decision by the sword. At the commencement of the war between France & England, the representative of the French republic then residing in the U S, complaining that the British armed ships captured French property in American bottoms, insisted that the principle of "free bottoms, free goods," was of the acknowledged law of nations; that the violation of that principle by the British was a wrong committed on us, and such an one as we ought to repel by joining in a war against that country. We denied his position, and appealed to the universal practice of Europe,

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in proof that the principle of “free bottoms, free goods,” was not acknowledged as of the natural law of nations, but only of it's conventional law. And I believe we may safely affirm, that not a single instance can be produced where

any nation of Europe, acting professedly under the law of nations alone, unrestrained by treaty, has, either by it's executive or judiciary organs, decided on the principle of “free bottoms, free goods.” Judging of the law of nations by what has been *practised* among nations, we were authorized to say that the contrary principle was their rule, and this but an exception to it, introduced by special treaties in special cases only; that having no treaty with England substituting this instead of the ordinary rule, we had neither the right nor the disposition to go to war for it's establishment. But though we would not then, nor will we now, engage in war to establish this principle, we are nevertheless sincerely friendly to it. We think that the nations of Europe have originally set out in error; that experience has proved the error oppressive to the rights and interests of the peaceable part of mankind; that every nation but one has acknoleged this, by consenting to the change, & that one has consented in particular cases; that nations have a right to correct an erroneous principle, & to establish that which is right as their rule of action; and if they should adopt measures for effecting this in a peaceable way, we shall wish them success, and not stand in their way to it. But should it become, at any time, expedient for us to cooperate in the establishment of this principle, the opinion of the executive, on the advice of it's constitutional counsellors, must then be given; & that of the legislature, an independent & essential organ in the operation, must also be expressed; in forming which, they will be governed, every man by his own judgment, and may, very possibly, judge differently from the executive. With the same honest views, the most honest men often form different conclusions. As far, however, as we can judge, the principle of “free bottoms, free goods,” is that which would carry the wishes of our nation.

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Wishing you smooth seas and prosperous gales, with the enjoyment of good health, I tender you the assurances of my constant friendship & high consideration and respect.